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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 308

MAXINE MURRAY, on her own behalf and as Guardian ad Litem of MAXINE LOIS MURRAY, a minor, Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM and MAX BLOOMENSTEIN, Respondents.

Writ of Certiorari to the Supreme Court of the State of Washington

Brief of Respondents

MOTION TO DISMISS

The respondents have heretofore served and filed a motion to dismiss the writ of certiorari herein, supported by their printed brief. Owing to the time re-

quired under the rules for noting said motion for hearing, the same cannot be brought on to be heard until too late for the filing of a brief upon the merits, in view of the position of this case upon the calendar. Therefore, without waiving their motion to dismiss, the respondents herewith submit their brief upon the merits, in order that there may be no unnecessary delay in obtaining a hearing upon the merits in the event, and *only* in the event, the motion to dismiss is denied.

The petitioner has filed a brief in opposition to the respondents' motion to dismiss in which it is sought to avoid or evade the holding of this court in *Hartford Accident & Indemnity Company v. Bunn*, 285 U. S. 169, upon four grounds.

First: It is claimed (Petitioner's Brief on Motion to Dismiss, pp. 6, 7) that the Fidelity and Deposit Company of Maryland was notified of the application for a writ of certiorari and refused to join or take any steps in the matter, et cetera. No reference to the printed record is made to support this claim and the respondents have no knowledge of any such alleged proceedings. If such proceedings were taken after the three months had elapsed during which application for the writ might be made, the proceedings are wholly ineffectual.

Second: It is said (Petitioner's Brief on Motion to Dismiss, p. 7) that the Fidelity and Deposit Company of Maryland has now entered its appearance and submitted itself to the jurisdiction of the court. This likewise is ineffectual. That is exactly what the surety in *Hartford Accident & Indemnity Company v. Bunn*, 285 U. S. 169, unsuccessfully attempted to do. Obviously the surety cannot now voluntarily submit itself to the jurisdiction of the court if the court acquired no jurisdiction within the three-months' period.

Third: It is claimed (Petitioner's Brief on Motion to Dismiss, p. 9) that the judgment for costs has been paid. A certificate by the clerk of the Superior Court of Kitsap County is appended to petitioner's brief to support this statement. The certificate is dated November 16, 1933. It does not disclose when the costs were paid. The fact is, however, that these costs were paid after the respondents' motion to dismiss was served. Moreover, it is difficult to see how satisfying the judgment which the petitioner seeks to review can aid the petitioner. That would seem to be an additional ground for dismissing the action as moot.

Fourth: Finally, it is said (Petitioner's Brief on Motion to Dismiss, p. 9) that at the time the Fidelity and Deposit Company of Maryland signed the bond as surety it took indemnity from the petitioner. It

is not clear what significance this is thought to have but it suffices to say that the record furnishes no basis for this claim.

In the *Hartford* case the court repeatedly stated that it will look only to the face of the judgment sought to be reviewed and if the judgment on its face is joint in form, the proceedings will be dismissed unless all parties to the judgment have joined in the petition or unless there has been a summons and severance.

STATEMENT

The action in the trial court was disposed of upon demurrer to the amended complaint. The demurrer was argued upon two grounds; first, that it did not state any cause of action under the State Workmen's Compensation Act, and second, that the plaintiff did not have legal capacity to maintain an action for wrongful death. The demurrer was sustained by the trial court. (Memorandum Opinion, R. 21-22.) Upon appeal the judgment was affirmed by the Supreme Court of Washington. (Opinion, R. 25-30.)

The action is to recover for alleged wrongful death. The amended complaint is double-barreled. It is founded first upon the terms of the Workmen's Compensation (Industrial Insurance Act) of the State of

Washington. In the second place it is claimed that the amended complaint alleges a good cause of action for wrongful death outside the terms of the Act.

Insofar as the first contention is concerned, consideration must first be directed to the provisions of the Industrial Insurance Act. The pertinent provisions of this Act are set forth at length in the Appendix (infra pages ——.)

The court will notice that the Washington Act is very different from the usual State compensation plan. It is exclusively a state insurance system to compensate employees injured in extra-hazardous occupations. It is compulsory. The state collects the insurance fund by means of assessments levied against the employers. The state assumes full responsibility for compensating the injured employees. The entire plan or system is administered by the Department of Labor and Industries of the State. All disputes between employer and the workmen are removed from the field of judicial controversy.

There is no such thing as a private insurance or compensation carrier, nor a self-insuring employer. The injured workman's remedy is solely against the Department of the State, and the only judicial recourse is for a court review of the findings of the Department.

The act provides, however, that if an employer is in default in either reporting his payrolls or making his premium payments to the State Fund, the injured employee may, at his option, sue such defaulting employer for *negligent* injury. Likewise if death results his beneficiaries or dependents may, at their option, maintain an action against the employer in default.

It is under this latter provision that the petitioner here seeks to recover. In her amended complaint she alleges that the decedent, her husband, met his injury and resultant death from an accident sustained while engaged in erecting a travelling crane at the Puget Sound Navy Yard. (Amended Complaint, par. VII, R. 13-14.) It is further alleged that the respondents, as employers, had failed to furnish the State Director of Labor and Industries with an estimate of its payroll, or to furnish monthly payrolls, or to pay premiums thereon, all as required by the Act.

It becomes pertinent, therefore, to inquire if the work in which the decedent was engaged was under the Act. If that Act did not apply, then of course the respondents were not defaulting employers. Unless they are defaulting employers, there is no basis for any action under the terms of the Act.

As an alternative, however, the petitioner claims that if she is not entitled to recover against the respondents as defaulting employers under the Act, she is entitled to recover against the respondents on the ground that the Amended Complaint alleges negligence upon their part in causing injury to, and the consequent death of, her husband. In other words, it is claimed that the Amended Complaint states a good cause of action for wrongful death outside the terms of the Act.

In answer to this contention the respondent points out that under the laws of Washington no action for wrongful death can be maintained except by the *personal representative* of the decedent, and that, therefore, the petitioner, suing in her own name and as guardian *ad litem* for her minor daughter, has no legal capacity to maintain an action for wrongful death.

It is an established fact, that the Puget Sound Navy Yard was acquired prior to the original adoption of the Washington Industrial Insurance Act. (Opinion Supreme Court of Washington, R. 26.) In 1891 the State, by Legislative Act, gave its consent to the acquisition of the Puget Sound Navy Yard and ceded exclusive jurisdiction thereof to the United States of America. (Laws 1891, page 31, Appendix, page

—.) Shortly prior thereto, on August 1, 1882, an Act of Congress was approved authorizing the condemnation of land for sites of public buildings, and for other purposes. (24 U. S. Statutes at Large, p. 357, Chapter 728.)

On March 2, 1891, an Act of Congress was approved making appropriations for the naval service for the fiscal year ending June 30, 1892, and authorized the Secretary of Navy to acquire, for the purpose of a dry dock, a tract of land not exceeding two hundred acres on Puge Sound, Port Orchard, Kitsap County, Washington.

In his annual report for the year 1891, at page 101, the Secretary of the Navy records:

> "Naval Station, Puget Sound, Wash.
>
> "Plans are being prepared for a dry dock at this locality, and as soon as completed and the land acquired, will be advertised.
>
> "Lieut. A. B. Wyckoff was ordered in April to proceed to Seattle, Wash., to acquire a site for this station.
>
> "He has performed this duty most satisfactorily to the Bureau, securing about 140 acres at Port Orchard; a tract of about 40 acres more is in the course of condemnation before the courts to get a clear title."

It is the contention of respondents that the Puget Sound Navy Yard having been acquired long prior

to the enactment of the Industrial Insurance Act,, the State of Washington had no legislative jurisdiction over that area, and that consequently the Act never became effective therein. Furthermore, the position of the respondents is that the Act of Congress dated February 1, 1928 (45 Stat. 54, Title 16 U. S. Code Ann., 1931 Supp. Sec. 457; see Appendix, page —), extending to cases of wrongful death within a National Park or other place subject to the exclusive jurisdiction of the United States such right of action as shall exist under the laws of the state within whose exterior boundaries such place may be, was designed to and does give only such right of action as existed by virtue of the laws of the State of Washington in effect at the time of the death of the decedent Murray herein.

SUMMARY OF POINTS AND AUTHORITIES

I.

THE INDUSTRIAL INSURANCE ACT OF THE STATE OF WASHINGTON NEVER BECAME EFFECTIVE WITHIN THE PUGET SOUND NAVY YARD

A. The Act Expressly Limits Its Application.

> "This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are *within the legislative jurisdiction of the State*, in the following enumeration, and they are intended to be embraced within the term

'extra hazardous' wherever used in this act." (Italics are ours.)

Laws of 1911, Chapter 74, Section 2, page 346; Laws of 1927, Chapter 310, Section 1, page 813.

"It seems to be the purpose of the Act to give the relief therein granted where the legislature had the power to abolish every other remedy."

State ex rel. Jarvis v. Daggett, 87 Wash. 253, 151 Pac. 648.

"This evident spirit of the act, we think, points to a legislative intend to make the act applicable only to those relations of employer and employee which are in the legislative control of the state untrammeled by the laws of the United States and the jurisdiction of the courts of the United States. which might have the effect of rendering the privileges and immunities for which the act provides unequal as between employers or unequal as between employees."

Shaughnessy v. Northland Steamship Co., 94 Wash. 325, 162 Pac. 546.

"The fact that Congress, on October 6, 1917, (Act Oct. 6, 1917, c. 97, par. 1, 2, 40 Stat. 395 (U. S. Comp. St. 1918, par. 991 (3) 1233,) amended (by adding the italicized portion) par. 24 and 256 of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 U. S. Stat. at Large, 1091, 1160), relating to the jurisdiction of Federal district courts in admiralty, and providing that Federal courts should have jurisdiction 'Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a commonlaw remedy where the common law is competent to give it, and to claimants the rights and remedies under the work-

men's compensation law of any state,' does not change the rule of these cases and extend to the industrial insurance commission jurisdiction of persons engaged in maritime work, for the reason that the workmen's compensation act of this state withdraws all 'remedy of workmen against employers for injuries received in hazardous work from private controversy' and excludes 'every other remedy,' and therefore *the Federal act cannot create a liability where one already exists in admiralty.*" (Italics are ours.)

Puget Sound B. & D. Co. v. Industrial Ins. Com., 105 Wash. 272, 177 Pac. 788.

"The act prior to its amendment vested in the Federal courts jurisdiction over 'all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.' The amendment added to the saving clause the sentence: 'and to claimants the rights and remedies under the workmen's compensation law of any state.' * * * But it is plain, we think, that our workmen's compensation act does not afford such a remedy. As we held in the case cited, the act was intended to be mutual in its operation, protecting employers of labor in certain enumerated employments, on the one side, from actions in courts of law for personal injuries, and giving to a workman injured while engaged in the numerated employments, on the other, a certain and sure relief for his injury, regardless of the manner in which the injury occurred or to whose fault it might be charged, and was intended to operate only in those instances which are within the exclusive legislative control of the state. It must follow, we think, that the amendment cited has no effect upon the workmen's compensation act of this

state, or the remedies afforded thereby, however effective it may be in other states having a different system for relief in this regard."

Lund v. Griffiths & Sprague Stevedoring Co., 108 Wash. 220, 183 Pac. 123.

See also:

State v. Dawson & Co., 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059, 264 U. S. 219;

McClure v. Wilson, 147 Wash. 119, 265 Pac. 485;

Van Dusen v. Department of Labor and Industries, 158 Wash. 414, 290 Pac. 803.

"The compensation act does not abolish the remedy of the death statute entirely. It abolishes the remedy only in those causes falling within the scope of the act—torts causing injury or death in extra-hazardous occupations *over which the state has sole and exclusive jurisdiction*—not those wherein it does not afford a complete remedy for both the employer and the employee." (Italics are ours.)

Roswall v. Grays Harbor Stevedore Co., 132 Wash. 274, 231 Pac. 934.

B. The Federal Court Is Bound by the Construction Placed Upon the Industrial Insurance Act and the Wrongful Death Statute by the Washington Supreme Court.

"where a state statute has been construed by the highest judicial tribunal of a state, such construction is regarded as a part of the statute and is as binding upon the federal courts as the text of the statutes itself."

25 C. J., Sec. 171, pages 832-833.

"By its literal terms the benefits of the statute are extended to all such surviving relatives, irrespective of their condition. It has, however, been held by the Supreme Court of Pennsylvania, in the case of Deni v. Pennsylvania R. Co., 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558, as well as in the case at bar, that this statute does not give to relatives of the deceased, who are non-resident aliens, the right of action therein provided for. There is nothing in this case to take it out of the general rule that the construction of a state statute by the highest court of the state must be accepted by this court. It is therefore not material that similar statutes have been differently construed, as, for instance, in Mulhall v. Fallon, 176 Mass. 266, 54 L. R. A. 934, 79 Am. St. Rep. 309, 57 N. E. 386, and Kellyville Coal Co. v. Petraytis, 195 Ill. 217, 88 Am. St. Rep. 191, 63 N. E. 94."

Maiorano v. Baltimore & O. R. Co., 213 U. S. 268 (l. c. 272).

See also:

Detroit v. Osborne, 139 U. S. l. c. 499;

Claiborne County v. Brooks, 111 U. S. 400 (l. c. 410);

Warburton v. White, 176 U. S. 484, 44 L. Ed. 555.

C. **Title to the Puget Sound Navy Yard Having Been Acquired by the United States by Purchase With the Consent of the Legislature of the State of Washington, the Federal Jurisdiction Became Exclusive.**

"To exercise *exclusive* legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular

States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, *Dock-Yards*, and other needful Buildings." (Italics are ours.)

Constitution of the United States, Article 1, Section 8, Clause 17.

By legislative act the State of Washington consented to the acquisition of the Puget Sound Navy Yard and ceded exclusive jurisdicion thereof to the United States of America. (See Appendix, pp. —.)

"When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and the Attorneys General."

Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525.

"(1) The provisions of the Labor Law do not help the plaintiff. They do not help her because they were enacted after the Navy Yard in Brooklyn was ceded to the United States (Laws 1853, c. 355). The common law and statutes passed

before the act of cession remain in force in the ceded territory until displaced by Congress, (Omitting citations), *but later statutes are of no effect. This is now the settled rule.* (Farley v. Schermo, 208 N. Y. 269; Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 537; W. U. Tel. Co. v. Chiles, 214 U. S. 274.)" (Italics ars ours.)

Kaufman v. Hopper, 115 N. E. 470 (N. Y.).

See also:

Commonwealth v. Clary, 8 Mass. 72;

Concessions Company v. Morris, 109 Wash. 46; 186 Pac. 655;

U. S. of A. v. Unzenta, 281 U. S. 138; 74 L. Ed. 761.

II.

THE PETITIONER HAS NO LEGAL CAPACITY TO SUE

A. Under the Washington Statute Only Personal Representatives of the Deceased Can Maintain an Action for Wrongful Death.

"If it be assumed that the action was brought under state statutes, we are of the opinion that the court's decision was right upon the ground of the incapacity of appellants to bring the action. Section 183, Rem. Comp. Stat., provides that all actions for damages against a person causing the death of another *shall be brought by the personal representative* of the deceased. We have had occasion to construe this statute on many occasions to this effect. Machek v. Seattle, 118 Wash. 42, 203 Pac. 25; Howe v. Whitman County, 120 Wash. 247, 206 Pac. 968; Castner

v. Tacoma Gas & Fuel Co., 123 Wash. 236, 212 Pac. 283."

Broughton v. Oregon-Wash. R. & Nav. Co., 137 Wash. 135, 241 Pac. 963.

See also:

Murray v. Joe Gerrick & Co., 72 Wash. Dec. l. c. 262 (Mar. 24, 1933).

B. The Federal Courts Have Held Similarly Under the Employers' Liability Act.

"We think the objection was interposed in due time and that the state courts erred in overruling it. Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited. See also Tiffany On Death by Wrongful Act, 2d ed. Sections 80, 109, 116."

St. Louis & San Francisco Ry. v. Seale, 229 U. S. 156.

See also:

Reading Company v. Koons, Administratrix, 271 U. S. 58 (1. c. 60);

Pecos & Northern Ry. v. Rosenbloom, 240 U. S. 439.

"To present a valid claim, the representative capacity must be established. Issurance of letters testamentary must be shown, and, if issued in another state, to have extra territorial force, the right must be conferred by statute. The

Washington statute confers no such right, and the state court does not recognize the personal representative of a deceased person from another state."

The Princess Sophia, 35 Fed. (2d) 736; 36 Fed. (2).

C. **The Report of the Senate Judiciary Committee Can Be Considered in Arriving at the Intent of Congress in Adopting the Act of February 1, 1928.**

"Reports of legislative committees. Reports and explanatory statements of legislative committees in charge of a bill, while not binding on the courts in interpreting statutes, may be resorted to as indicative of the intent of the legislature in a case where the meaning of the statute is obscure, or for the purpose of ascertaining the necessity for the enactment, the situation under earlier laws, and the proposed remedy of the new law, but not for the purpose of construing a statute contrary to its plain terms. If the statements made in the reports accord with the reasonable interpretation to be drawn from the language of the act itself, they will be followed."

59 C. J. Sec. 606, pages 1021-1022.

"I concur with these judges in the belief that resort may properly be had to reports of legislative committees for the purpose of ascertaining the occasion and necessity for the enactment, the situation confronting the Congress under the earlier laws, and the proposed remedy of the new law. Park Assessment Co. v. McCaughn (D. C.) 14 Fed. (2d) 553."

American Glue Co. v. United States, 42 Fed. (2d) 235 (1. c. 237).
(Judgment affirmed. 282 U. S. 409, 1. c. 422).

ARGUMENT

I.

THE INDUSTRIAL INSURANCE ACT NOT APPLICABLE

It seems quite clear that the Industrial Insurance Act was never applicable to the work in which the decedent was engaged. The Act expressly recites that it is intended to apply to inherently hazardous works and occupations

"within the legislative jurisdiction of the state."

It is established that the work was being performed within the boundaries of the Puget Sound Navy Yard; that the Industrial Insurance Act was not adopted by the State of Washington until 1911; that the Navy Yard was acquired by the United States Government, with the consent of the State Legislature, long prior to 1911; that from the time of its acquisition under the Constituion it came within the exclusive legislative jurisdiction of Congress.

It is clear, therefore, that the Industrial Insurance Act could have no application to work within the Navy Yard. Such being the case, the employers of the decedent were not within the terms of that Act. Therefore they were not obligated to make payroll reports, nor pay premiums to the State of Washington Not being so obligated they could not be in default for not

having performed those acts. Not being defaulting employers they were not amenable to the provisions of the Industrial Insurance Act relating to liability of defaulting employers to injured workmen.

The futility of the contention raised by the petitioner that the Washington Act applied to the work being performed by decedent, in spite of the express limitations of the Act, and in spite of the construction placed upon the Act by the decisions of the Supreme Court of Washington is further shown by the nature of the Act itself. As pointed out in our Statement, it is a State compulsory insurance Act in which the State creates the fund and pays compensation to injured workmen. The Department charged with the administration of the Act has consistently refused to require payroll reports from, and the payment of premiums by, employers engaged in extra hazardous work within the boundaries of the Navy Yard. Can it be seriously argued that under those conditions the Federal Courts can require the State of Washington, through its Department of Labor and Industries, to levy assessments upon and collect premiums from employers engaged in extra hazardous occupations or works within the Navy Yard? Or can the Federal Courts require the State of Washington, through such Department, to compensate injured workmen? If Federal Courts can hold the terms of the act suffici-

ently applicable to work within the Navy Yard as to fix liability upon the employer as a defaulter under the terms of the Act, then it would certainly seem to have like power to hold the State liable to pay compensation out of the State Fund to the injured employee.

Unless the Federal Courts can find power to enforce this latter obligation, then certainly it must perforce refuse to find the liability contended for by the petitioner.

On this branch of the case we are confident that this Honorable Court must hold that the Industrial Insurance Act of the State of Washington, by virtue of the very limitations contained in the Act itself, and by virtue of the construction which has been put upon the Act by the decisions of the Supreme Court of Washington, never did become effective within the boundaries of the Puget Sound Navy Yard, which was established and came within the exclusive legislative jurisdiction of the United States before the adoption of that Act.

II.

THE STATE DEATH STATUTE OF 1917 GOVERNING

We concede that in all probability the state death statute of 1881 providing

> "When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death," (Section 8, Code of 1881, Section 183, Remington and Ballinger's Annotated Code of Washington).

the adoption of which had preceded the acquisition of the Navy Yard by the United States, remained in effect until the adoption by Congress of the Act of February 1, 1928. (See Appendix, page ---.)

While there has been no judicial construction of this Act of Congress, a reference to the report of the Senate Judiciary Committee seems to indicate quite clearly the purpose of the Act, said report being as follows:

> "The bill (S-1798) * * * was read as follows: (Here the statute is set out.)
>
> "Mr. Robinson of Arkansas: 'I think there should be an explanation of the bill.'
>
> "Mr. Walsh of Montana: 'A similar bill has passed the Senate many times, at least three or four, but for some reason or other it has not succeeded in securing the approbation of the House. It is intended practically to make application of what is known as Lord Campbell's Act to places within the exclusive jurisdiction of the United States.
>
> "Practically every state now has given a right of action to the legal representatives of the dependent relatives of one who has suffered a death

by reason of the neglect or wrongful act of another, there being no such recovery, it will be recalled, at common law.

"There are a great many places in the United States under the exclusive jurisdiction of the United States—the national parks, for instance. If a death should occur within those places, within the exclusive jurisdiction of the United States, there would be no right of recovery on the part of the representatives or dependents of the person who thus suffered death as a result of the wrongful act or neglect of another.

"In the State of the Senator I suppose a right of action is given by the act of the Legislature of the State of Arkansas to the representatives of one who thus suffers, but if the death occur within the Hot Springs Reservation, being entirely within the jurisdiction of the United States, no recovery could be had, because recovery can be had there only by virtue of the laws of Congress. The same applies to the Yellowstone National Park in Wyoming and the Glacier National Park in Montana."

Congressional Record, Volume 69, page 1486.

The clear intent to be gathered from the terms of Act itself, as well as the report of the Judiciary Committee seems to be to make effective and applicable to any instance of wrongful death occurring within the boundaries of those places subject to the exclusive legislative jurisdiction of Congress the then existing wrongful death statute of the State within whose exterior boundaries such place is located. In other words, the legal action or remedy given by this Act of

Congress of February 1, 1928, is such action or remedy as is effective within the State *at the time the wrongful death occurs.* In 1917 the State of Washington repealed the wrongful death statute of 1881, and substituted in lieu thereof a new death statute giving a right of action for the benefit of certain heirs and dependents of the decedent, but expressly providing that such action could be maintained only by *the personal representative of the decedent.* This 1917 statute was in effect within the State of Washington at the time the petitioner's decedent met his death.

Therefore, under the terms of the Act of Congress of February 1, 1928, the personal representative of the decedent, Murray, was the only one authorized by the laws of the State of Washington to maintain an action for his alleged wrongful death. This is the remedy, and the only remedy, which is authorized under the terms of the Federal Act.

Timely steps were taken, both by motion and by demurrer, to question the legal capacity of the petitioner herein to sue in her own right and as guardian *ad litem* for her minor child. These challenges were sustained by both the trial court and the Supreme Court of the State. Their decisions were based upon established and prior holdings construing the 1917 death statute. The Federal Court is bound by the

decisions of the Supreme Court of the State of Washington.

The case before the court is to be distinguished from such case as *Missouri K. & T. Ry. Co. v. Wulf*, 192 Fed. 919, 226 U. S. 570-578, cited by the petitioner, in that no timely objection was made by the defendant. Neither has any application ever been made by the petitioner to have herself, as administratrix of the estate of her deceased husband, substituted as plaintiff in the action, as seems to be intimated on page 13 of petitioner's petition and brief. The opinion of the Supreme Court expressly states:

> "Cases holding to the effect that the objection that the action is not brought in the name of the proper party must be timely made are of no controlling importance here, because in this case the respondents raised the question upon their first appearance and continued to insist upon it."
>
> *Maxine Murray On Her Own Behalf and As Guardian Ad Litem of Maxine Lois Murray, a Minor, appellant, v. Joe Gerrick & Company, et al., respondents*, 72 Wash. Dec. 257, R. 25-30.

Not only is the record barren of any application on the part of the petitioner to appear in a representative capacity, but it affirmatively appears also that the petitioner was, at all times, insisting upon her right to maintain the action in her personal and individual

capacity. To the original complaint the respondents demurred, setting forth as one ground of demurrer that

> "neither of the plaintiffs has any legal capacity to sue." (R. 8.)

After this demurrer had been sustained, and the plaintiff had filed her amended complaint again alleging her right to sue in a personal capacity, the respondents renewed, by demurrer, the same objection. (R. 19-20.) This contention was sustained by the trial court in his memorandum opinion (R. 21, 22). The trial court was affirmed in the opinion of the Supreme Court. (R. 29, 30.)

The Washington decisions heretofore cited have definitely construed the Washington death statute as requiring the action to be brought by the *personal representative only*. This construction the Federal Court will accept. Furthermore, the construction is in accordance with the prior decisions of this Honorable Court under the Federal Employers' Liability Act which have been heretofore cited.

The respondents therefore stand upon the two positions which they have taken heretofore, that the amended complaint failed in two respects:

1. That it showed conclusively that the Industrial Insurance Act of the State of Washington did not ap-

ply to the work which the decedent was doing, and that therefore no right could accrue to the petitioner under that act; and

2. That no action can be maintained for wrongful death outside of the Industrial Insurance Act except by the personal representative of the decedent.

It seems to us that the Supreme Court of the State of Washington was correct in its judgment, and that the writ of certiorari must fail.

Respectfully submitted,

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J. SPEED SMITH & HENRY ELLIOTT, JR.,

Attorneys for Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein, Respondents.

APPENDIX

PERTINENT PROVISIONS OF WASHINGTON INDUSTRIAL INSURANCE ACT

"7673. Declaration of police power. * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 7673 Rem. Rev. Stat. of Washington; Laws of 1911, Chapter 74, Section 1, page 345.

"7674. Extrahazardous employment. There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within *the legislative jurisdiction of the state*, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' whenever used in this act, to-wit: * * *"

Section 7674, Rem. Rev. Stat. of Washington; Laws of 1927, Section 1, page 813, Cf. Laws of 1911, Chapter 74, page 346, Section 2.

"7676. Schedule of contribution—Pay-rolls—Record of Employment—Penalties—Funds, now kept—Premium deductions prohibited—procedure. Inasmuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall prior to the fifteenth day of February, 1932, and prior to the fifteenth day of each month thereafter, pay into the state treasury (1) for the accident fund, a sum equal to a percentage of his total payroll for the preceding calendar month, and (2) for the medical aid fund a certain number of cents for each day worked by workmen, all while engaged in extra-hazardous employment. * * *

"Every employer who shall enter into any business, or who shall resume operations in any work or plant after the final adjustment of his payroll in connection therewith, shall, before so commencing or resuming operations, as the case may be, notify the director of labor and industries of such fact, accompanying such notification with an estimate of his payroll for the first calendar month of his proposed operations, and shall make payment of the premium on such estimated payroll. Every such employer shall be liable for a premium of at least such estimated payroll. * * *

"Every employer who shall fail to furnish an estimated payroll and make payments as above provided shall be liable to a penalty of not to exceed five hundred dollars ($500.00) and shall also be liable if an accident has been sustained by an employee prior to the time such estimate is received by the department, to a penalty in a sum equal to fifty per cent of the cost to the accident fund and medical aid fund of such accident, to be collected in a civil action in the name of the state, and paid into the accident fund. The director of labor and industries may waive the

whole or any part of any penalty charged under this act. In respect to any injury happening to any of his workmen during the period such employer shall be in default in the payment of any premium, if such default be after demand for payment; or if such employer shall be in default for failure to furnish the department with an estimated payroll or with monthly reports of his payroll as required by this section, the defaulting employer shall not be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or his beneficiaries and dependents), at his or their option, as he would have been on March 14, 1911, and in any action brought against such employer, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that the negligence of the injured workman, other than his wilful act committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury. If such injured workman or his beneficiaries, or dependents, shall elect to take under this act, such action against the employer shall revert to the state for the benefit of the accident fund."

Section 7676, Rem. Rev. Stat. of Washington; Laws of 1931, Section 1, page 297; Cf. Laws of 1911, Section 4, page 349.

"7679. Schedule of awards. Each workman who shall be injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in

lieu of any and all rights of action whatsoever against any person whomsoever. * * *"

Section 7679, Rem. Rev. Stat. of Washington; Laws of 1929, Section 2, page 329; Cf. Laws of 1911, Section 5, page 356.

STATE OF WASHINGTON WRONGFUL DEATH STATUTE OF 1917

"183. Right of action for wrongful death. When the death of a person is caused by the wrongful act, neglect or default of another, his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony."

Section 183, Rem. Rev. Stat. of Washington; Laws of 1917, Section 1, page 495; Cf. Laws of 1854, Sec. 496, page 220.

"183-1. Beneficiaries of action for wrongful death. Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just."

Section 183-1, Rem. Rev. Stat. of Washington; Laws of 1917, Section 2, page 495.

ACT OF CONGRESS DATED February 1, 1928, EXTENDING STATE REMEDY FOR WRONGFUL DEATH TO NATIONAL PARKS AND OTHER PLACES UNDER THE EXCLUSIVE JURISDICTION OF THE UNITED STATES WITHIN THE TERRITORIAL BOUNDARIES OF SUCH STATE.

"Action for death or personal injury within national park or other place under jurisdiction of United States; application of State Laws. In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the States within the exterior boundaries of which it may be."

(Feb. 1, 1928, c. 15, 45, Stat. 54; Section 457, Title 16, U S. C. A.).

State Statute Consenting to United States Acquiring Ownership and Jurisdiction of State Lands

"8108. Consent to acquisition of certain rights by United States, etc. The consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same. of any tract, piece, or parcel of land, from any individual or individuals,

bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States, which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent, or other official document or papers describing such lands; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Consitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such

tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

Section 8108 Rem. Rev. Stats.; Laws 1891, page 31.